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ISS Issues Guidance Regarding COVID-19 Pandemic

Recognizing the extraordinary challenges facing U.S. companies due to the COVID-19 pandemic, ISS issued guidance regarding its approach to specified corporate governance, capital structure and compensation matters. The guidance generally strikes a flexible tone: "We at ISS understand and recognize the many challenges and uncertainties being faced by investors and companies, and that the current situation requires understanding and flexibility in many ways." This memorandum sets forth the key takeaways from the ISS release.

Virtual-Only Annual Meetings. In light of the need for social distancing, ISS endorsed virtual-only shareholder meetings under the current circumstances. ISS will not recommend votes against companies that hold virtual-only meetings during the current proxy season. ISS encourages issuers that hold virtual-only meetings to disclose clearly the reasons for the decision and to strive to provide shareholders with a meaningful opportunity to participate.

Rights Plans. Consistent with its existing policy framework, ISS recognizes that a severe stock price decline as a result of the COVID-19 pandemic is likely to be considered a valid justification in most cases for adopting a rights plan of less than one year in duration. In assessing a company's adoption of a rights plan, ISS will consider a board's explanation for its action, including any imminent threats, and the specific plan provisions (triggers, terms, "qualified offer" provisions and waivers for "passive" investors) of the pill.

Share Repurchases. In the absence of regulatory prohibitions or serious concerns relating to a company, ISS generally will support stock repurchase authority within customary limits. For purposes of 2021 annual meetings, ISS will consider 2020 stock repurchases in assessing whether directors managed risk in a responsible fashion. While it is valuable to understand the ISS perspective on share repurchases, it is important to recognize that there may be other important stakeholder interests to consider in determining the degree to which share repurchases are appropriate.

Dividends and Capital Raising. For 2020, ISS will support broad discretion for boards that set dividend payout ratios that may fall below historic levels or customary market practice. In assessing dividend and capital raising activities, ISS will consider whether the board disclosed plans to use its resources to protect the business and work force. In addition, ISS will exercise case-by-case

flexibility with respect to requests to increase authorized stock, issue additional shares or otherwise raise capital in the current environment, recognizing that the pandemic will require many companies to seek additional financing. This flexibility is consistent with the NYSE's temporary relaxation of certain shareholder approval rules for private placements of equity. See our recent memorandum, "NYSE Temporarily Relaxes Shareholder Approval Rules."

Board Composition. While ISS benchmark policies generally prioritize director independence, minimizing director over-boarding, and promoting director diversity, for those companies that need to fill vacancies due to director incapacity or to add critical expertise, ISS will consider such changes on a case-by-case basis, with careful attention to a company's explanation for any such changes. "Simply put, [ISS] believe[s] that boards should have broad discretion during this crisis to ensure that they have the right team in place and [ISS] will adjust the application of [its] policies as appropriate for the exceptional circumstances of the current pandemic."

Modifying Incentive Plan Performance Metrics. ISS encourages those companies that revise 2020 annual bonus performance metrics to provide contemporaneous disclosure to shareholders (*e.g.*, via Form 8-K) of their rationale for making such changes, suggesting a more receptive response by ISS in 2021 for those issuers that are prompt and transparent in their public filings.

Noting that it generally disfavors midstream changes to awards that cover multi-year periods, ISS will consider any such changes on a case-by-case basis, assessing whether directors exercised appropriate discretion and provided adequate explanation to shareholders of the rationale for the changes.

ISS will assess, under its existing benchmark policy framework, structural changes to long-term incentive plans that take the new economic environment into account.

Option Repricing. The pandemic has not affected the ISS approach to option repricing. ISS disfavors option repricing without shareholder approval and will assess such action under its U.S. benchmark policy board accountability provisions. Moreover, ISS generally will oppose any repricing proposal that occurs within one year of a precipitous drop in the company's stock price. Accordingly, if boards seek shareholder approval of repricing actions at 2020 meetings, they likely will face ISS opposition. In addition, ISS will examine whether (1) the design is shareholder value neutral (a value-for-value exchange), (2) surrendered options are

not added back to the plan reserve, (3) replacement awards do not vest immediately, and (4) executive officers and directors are excluded.

Looking Ahead. ISS has committed to updating its guidance and providing new information as needed throughout the remainder of the 2020 proxy season. In addition, ISS stated that it will reach out to investors and other constituencies to address whether further adjustments to its policies will be appropriate with respect to the 2021 proxy season.

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Over the coming months, directors will be called upon to make difficult decisions under extraordinary time pressure. The spirit of flexibility reflected in this general guidance is welcome, and we urge ISS to exercise deference to company boards in specific cases as directors navigate the unique challenges of the day.

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